U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 2 5 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding the defined equivalent of an advanced degree. The petitioner seeks employment as a high school science special education teacher in Baltimore, Maryland. The petitioner taught at from 2005 to 2011, and again beginning in 2012. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding the equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with post-baccalaureate experience equivalent to an advanced degree under the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest

by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 12, 2012. In an accompanying statement, counsel stated:

> Considering [the petitioner's] more than five (5) years of teaching Science to 12th Grade Special Education students in [redacted] Maryland, she has in her own little but noble way been contributing to the national interest of helping improve the Special Education in the United States of America. This fact finds solid support from the

> testimonials rendered by her superiors, colleagues and a parent. Further, various distinctions, awards and recognitions were granted by honoring her significant contributions.
>
> In addition to [the petitioner's] twelve years (12) of teaching Science to high school students, her exceptional musical prowess proved to be her secret weapon in educating her Special Education students more effectively. Aside from capturing the students' attention and igniting their interest to learn, she inspires them to be good citizens of the United States of America and become integral part[s] of the work force in the future. In other words, [the petitioner's] musical gift enables her to touch the hearts of her students and make a difference in their personal and professional lives in the future.

The aforementioned letters from administrators, teachers, and others contain praise for the petitioner's dedication and the quality of her work. Five of the letters contain an identical passage, indicating that the petitioner "taught Science to students with a variety of learning disabilities, primarily those who presented with mental retardation (Moil)." The parenthetical word "Moil" is an acronym for "moderately intellectually limited."

The petitioner submitted copies of evaluations, performance review reports, and certificates. These materials documented her success as a teacher at but they do not show her impact and influence on education outside of that school.

The petitioner also submitted certificates, photographs, and recordings as "Evidence of Self-Petitioner's Exceptional Ability as a Musician." The petitioner did not establish the relevance of these materials to her work as an educator. The petitioner has sung in the school choir and at school events such as graduation ceremonies, but these instances do not amount to impact or influence on education, providing benefits that are national in scope.

In a request for evidence (RFE) dated July 12, 2012, the director instructed the petitioner to submit documentary evidence to meet the guidelines set forth in *NYSDOT*. The director acknowledged the petitioner's submission of award certificates, and requested further evidence to establish their significance.

In response, counsel stated:

> Since a 'National Special Education Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even authors of books, treatises and other academic materials on Special Education are not in any standing [*sic*] to claim that their contributions are national in scope since not all special education teachers can be said to utilize their works.

> Further, the curricula used by each state education department in the United States vary from each other.

The director did not require that the petitioner show that she is "a 'National Special Education Teacher,'" or that "all special education teachers . . . utilize [her] works." National scope is not the same as universal reliance on the petitioner's work.

Counsel's assertion that different jurisdictions use different curricula is not a factor in favor of granting the waiver. Instead, it serves to emphasize the local nature of the petitioner's impact, as stated in *NYSDOT*'s discussion of the "national scope" prong of the national interest test: "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217 n.3.

Counsel stated: "it is but harmless to assert that if an NIW [national interest waiver] Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope." All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. Congress could create a blanket waiver through new legislation, and has done so in the past. Section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Thus, Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*. Congress, to date, has not taken similar action with respect to teachers.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interpreted this passage to mean that Congress created the national interest waiver for educators. President Bush, however, did not mention the national interest waiver in his remarks; he was discussing the Immigration Act of 1990 as a whole, which included provisions that subject members of the professions (including "scientists and engineers and educators") to the job offer requirement.

Counsel cited other federal initiatives and legislation, focusing on the No Child Left Behind Act (NCLBA), Pub.L. 107-110, 115 Stat. 1425 (Jan. 8, 2002), which prioritized the hiring of "Highly Qualified Teachers." The NCLBA contains no provision relating to the national interest waiver or modifying the immigration provisions already in effect for teachers as members of the professions. Counsel, however, asserts that the statute is relevant because it highlights the importance of education, and because "today's United States workers or Special Education Teachers are not as competitive as the foreign teachers who are already in the country since not all of them were educated by 'Highly Qualified Teachers.'" This assertion includes several unsupported assumptions, such as the assumption that U.S. teachers are, as a class, less qualified than foreign teachers, and that "all [foreign teachers] were educated by 'Highly Qualified Teachers.'" The unsupported assertions of counsel do

not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel asserted "that retaining is more cost effective than recruiting new clients [*sic*]," and therefore "the most practicable approach" is to allow U.S. employers to continue to employ foreign workers whom they have already hired, rather than replace them with new U.S. workers who require additional training. The standard for the waiver of the job offer requirement is the national interest, not what might be most efficient or cost-effective for individual employers. Counsel's proposed standard would effectively amount to a blanket waiver for all foreign workers currently employed in nonimmigrant status.

Counsel stated:

> [The petitioner] is one of the 59% [of] special educators in the nation with a Master's degree or equivalent.
>
> [The petitioner] is one of the 92% [of] special educators with full certification.

Elsewhere, counsel cited the *SPeNSE Study of Personal Needs in Special Education: Key Findings* as stating: "Fifty-nine percent of special educators had their Master's degree," not "a Master's degree or equivalent" as counsel stated in the above passage. The beneficiary does not hold a master's degree, and therefore this statistic appears to indicate that the petitioner's academic qualifications are lower than those held by the majority of workers in her field. The petitioner's full certification as a special educator is a credential shared by a substantial majority of others in the field.

Counsel claimed that the labor certification process would pose a "dilemma" because the petitioner's qualifications exceed the minimum requirements for the position, and "the employer is required by No Child Left Behind (NCLB) Law . . . to employ highly qualified teachers." Counsel did not show that these two considerations are incompatible. Section 9101(23) of the NCLBA defines the term "highly qualified teacher." By the statutory definition, a "highly qualified" school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis." Counsel did not explain how the above requirements are incompatible with the existing labor certification process. The minimum degree requirement is the same for labor certification as it is for a highly qualified teacher (*i.e.*, a bachelor's degree).

Counsel asserted that the petitioner possesses intangible, unquantifiable traits that make her superior to likely U.S. candidates for her intended position. Counsel stated: "It would be [a] more fruitful learning experience to students with 1 highly qualified teacher than having like 5 non-highly qualified teachers." Counsel cited no source for this assertion, instead stating it as an opinion. Later in the statement, counsel referred back to this opinion as though it were an independently supported finding, stating: "it has been deemed more effective learning experience to students to instead have one (5) [*sic*] highly qualified teacher than having five (5) non-highly qualified mentors." As a generalization, this unsupported assertion does not establish a blanket waiver for "highly qualified teachers" as the NCLBA defines that term. As a claim specific to the petitioner, the petitioner submitted no evidence that she has been as effective as five less-qualified teachers.

Counsel listed several certificates that the petitioner has received for her work. The director, in the request for evidence, had specified that the petitioner must establish the significance of such materials, but the petitioner did not do so. Simply listing the exhibits does not establish their significance.

Counsel asked that the present petition "be treated in the same light as a previous I-140 National Interest Waiver Self-Petition" for another individual who is "also a teacher in [redacted]' and which the director approved. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Although counsel asserted more than once that the present petitioner taught in [redacted] her only teaching experience in the United States has been in Baltimore, which is an independent city outside of [redacted]

[redacted] principal of [redacted], stated:

> [The petitioner] was a tremendous influence for students and did an excellent job in her assignment. . . . In fact, our school assessment scores for (ALT-MSA) exceeded the city and state average. . . .
>
> On July 30, 2011 [the petitioner's] teaching contract was terminated by the district due to immigration issues. Her working visa expired. By the time that [the petitioner] was gone, our school assessment score in science declined.
>
> . . . [After she] was given a Work Authorization in US . . . [the petitioner] reapplied to the district for a teaching position. For this school year I've requested the district to rehire [the petitioner] and assign her to [redacted] Now she is currently teaching at [redacted] to students with severely profound disabilities.

The petitioner had previously indicated that her H-1B nonimmigrant status did not expire until October 21, 2011, and USCIS records corroborate that date.

The petitioner did not submit the Maryland State Assessment (MSA) results to show the extent of the improvement and subsequent decline, or establish other factors that may have been in play. Furthermore, the petitioner did not establish that her effect on MSA scores went beyond or beyond her specific classes in that school.

Section 203(b)(2)(A) of the Act states that aliens of exceptional ability are subject to the job offer requirement. The USCIS regulation defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Therefore, it cannot suffice for the petitioner to establish that she is better than many other teachers. The statute, regulations, and case law do not limit the job offer requirement, including labor certification, only to minimally-qualified workers. *NYSDOT* is a binding precedent decision, and counsel did not succeed in constructing an alternative national interest standard more favorable to the petitioner.

The director denied the petition on April 15, 2013. The director acknowledged the petitioner's evidence, and concluded that the petitioner had not met the *NYSDOT* guidelines to establish eligibility for the national interest waiver.

On appeal, counsel contends: "USCIS erred in giving insufficient weight to the national educational interest enunciated in the No Child Left Behind Act of 2001 as the guiding principle rather than the precedent case [*NYSDOT*] which involved an engineer." *NYSDOT*, as a published precedent decision, is binding on all USCIS employees under 8 C.F.R. § 103.3(c), and its core guidelines are not limited to engineers. In contrast, the NCLBA is not an immigration statute; it did not amend the Immigration and Nationality Act; and it makes no mention of foreign teachers or the national interest waiver. Therefore, there is no basis to conclude that the NCLBA supersedes *NYSDOT* or, as counsel claims, "has preempted the USCIS with respect to the parameters that should guide its determination whether a waiver of the job offer requirement based on national educational interests is warranted."

Counsel contends that a waiver is in order "if it is established that the alien will substantially benefit prospectively the national educational interests of the United States." The plain text of section 203(b)(2)(A) of the Act, however, states: "Visas shall be made available . . . to qualified immigrants who . . . will substantially benefit prospectively the national . . . educational interests, or welfare of the United States, and whose services . . . are sought by an employer in the United States." In this way, Congress specified that substantial prospective benefit to the interests of the United States is not sufficient for the waiver; an intending immigrant who offers such benefit must still be "sought by an employer in the United States." The NCLBA did not establish a lower standard for teachers.

Counsel contends that *NYSDOT* "requires overly burdensome evidence on the qualification of the self-petitioner, identical to EB-1 extraordinary requirements when the law makes it available to those either 'with an advanced degree' or 'exceptional ability.'" The evidentiary requirements to establish extraordinary ability appear at 8 C.F.R. § 204.5(h)(3). Those requirements are not "identical" to the guidelines in *NYSDOT*, and counsel has identified no strong similarities. Concerning counsel's assertion that the waiver is "available to those either 'with an advanced degree' or 'exceptional ability,'" those qualifications make one eligible to apply for the waiver, but do not guarantee the approval of that application.

Counsel states:

> Assuming *NYSDOT* is apposite, the perennial question is what is the standard to be met in order that an NIW petitioner's proposed employment will have national-level benefit. . . .
>
> Our position is that NCLB and the Obama Education Programs have determined the National Educational Interests including the qualification of professionals to achieve it.

The opening clause of the quoted passage incorrectly implies that *NYSDOT*'s applicability is debatable. Under 8 C.F.R. § 103.3(c), *NYSDOT* is binding on all USCIS employees. The NCLBA and related federal initiatives all address the general goal of improving education on a national scale; they do not establish that one individual teacher contributes toward those goals on a nationally significant level. Counsel asserts that the petitioner's "proven success in raising proficiency of her students transcends the classroom and imparts national benefits," but counsel does not elaborate or explain how this is so.

Counsel cites "[t]he mandate for 'flexibility in the adjudication of NIW cases,'" but calls for an inflexible standard by which every teacher who meets the definition of a "highly qualified teacher" should receive a national interest waiver.

Counsel asserts that the petitioner "has submitted overwhelming evidence" of eligibility, and lists several previously submitted exhibits under the heading "Awards and Recognition." Some of the listed exhibits relate to the petitioner's musical work. The petitioner has not established that these materials are "overwhelming evidence" in her favor. Local recognition can help support a claim of exceptional ability, under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), but exceptional ability does not establish or imply eligibility for the waiver.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers, and asserts: "the USCIS-Texas Service Center should have presented its own comparable worker, if there be any at all," as a basis for comparison against the petitioner. Counsel's contention rests on the incorrect assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision in *NYSDOT* is that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. To do so does not require an invasive review or comparison of other teachers' credentials.

Counsel repeats prior assertions, such as the claim that the petitioner merits special consideration as "one of the 92% [of] special educators with full certification." These assertions predate the denial decision and do not rebut the grounds raised in that decision.

Counsel also states: "U.S. workers in the teaching industry are not as competitive in the job market as against their foreign counter-parts who have advanced degree or equivalent and fully certified." Counsel cites no support for this broad and general claim.

Counsel claims:

> there is more likelihood than not as dictated by experience that replacing 'Highly Qualified Teachers' with those having only minimum qualification that these federally funded schools would fail to meet the high standard required under the No Child Left Behind (NCLB) Law resulting not only [in] closure of these schools but loss of work for those working in those schools.

Counsel identifies no "federally funded school" that has closed as a result of failing to meet NCLBA standards. Attributing this claim to "experience" cannot suffice in this regard. Also, counsel has not shown that awarding the waiver to the petitioner would prevent school closures on a nationally significant scale.

Congress has established no blanket waiver for teachers based on the overall importance of education; eligibility for the waiver rests on the merits of the individual alien. The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence must be national in scope. *NYSDOT* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, such as teaching, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.